

**Public Service Commission Regulation Docket No. 56**  
**PSC Regulation 3008, *Rules and Procedures to Implement the Renewable Energy Portfolio Standards Act***

**October 2, 2017**

**COMMENTS OF THE DNREC DIVISION OF ENERGY & CLIMATE**

**Background**

PSC Staff has published a revised draft revision of Reg. 3008 regarding the Renewable Energy Portfolio Standards Act (REPSA) cost cap provisions (26 *Del. C.* § 354(i) & (j)). These two sections authorize, but do not require, the Director of the Division of Energy & Climate (“Director”), in consultation with the Public Service Commission (“PSC” or “Commission”), to freeze the Renewable Portfolio Standard (“RPS”) for Delmarva Power if the cost of compliance with the overall RPS exceeds 3 percent of the total retail costs of electricity, or exceeds 1 percent for solar PV. Because this draft includes substantive revisions, it was republished in the September 1, 2017 *Register of Regulations*, prompting another round of comments.

In a related matter, the DNREC Division of Energy & Climate has, as promised, repealed Reg. 2102, *Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions*. That repeal was published in the August 1, 2017 *Register of Regulations* and became effective August 11, 2017.

In most respects, DNREC is comfortable with the revised regulations, and would be supportive but for one notable exception. DNREC cannot support the inclusion of Sections 3.2.21.6.2 and 3.2.21.9.2 that would effectively create a right of judicial review of the Director’s determination to freeze or to not freeze the RPS.

**Argument**

The identical text in Sections 3.2.21.6.2 and 3.2.21.9.2, newly inserted into the draft, would subject the Director’s determination to freeze or not to freeze the RPS to judicial review:

The written determination shall constitute a Final Agency Action of DNREC under 29 *Del. C.* §10141(b) and as required by this Regulation.

Declaring that the determination constitutes a Final Agency Action of DNREC under 29 *Del. C.* §10141(b) would effectively create a right of judicial review of the Director's determination. DNREC believes that Staff erred in proposing these two sections, and urges the Commission to strike them for the following reasons:

1. The proposed right of judicial review is not based on any language found in REPSA.
2. There is no right of judicial review required or even suggested in Judge LeGrow's Memorandum Opinion in *DPA v. PSC*.
3. Creating a right of judicial review goes well beyond the scope of PSC Orders No. 9024 and No. 9025.
4. The provisions are based on an incorrect interpretation of 29 *Del. C.* § 10141(b).
5. The PSC does not have the authority to assert or create a right to judicial review for another state agency.
6. The Staff Review and Recommendations does not offer a sufficient policy basis or legal reasoning for asserting a right of judicial review.

These reasons are detailed below.

*1. The proposed right of judicial review is not based on any language found in REPSA.*

REPSA does not provide the PSC with any authority to assert a right to judicial review. The PSC's regulatory authority, established in § 362(b), is limited to specifying procedures for freezing the RPS and adjusting the alternative compliance payment, not for contesting the Director's decision to freeze or not to freeze:

(b) For regulated utilities, the Commission shall further adopt rules and regulations *to specify the procedures for freezing the minimum cumulative solar photovoltaic requirement* [emphasis added] as authorized under § 354(i) and (j) of this title, and for adjusting the alternative compliance payment and solar alternative compliance payment as authorized under § 358(d)(4) and (e)(3) of this title.

The Commission's authority does not extend to asserting a right to appeal a determination on the part of the Director, for the reason that no provision for an appeal is included in REPSA and the Commission's regulatory authority in this matter is limited to the matters specified in § 362(b).

2. *There is no right of judicial review required or even suggested in Judge LeGrow's Memorandum Opinion in DPA v. PSC.*

Judge LeGrow clearly and specifically described the Commission's authority to promulgate regulations in this matter:

Section 362(b) states "the Commission shall further adopt rules and regulations to specify the procedures for freezing the minimum [renewable energy purchase] requirement as authorized under § 354(i) and (j) of this title. *This is the only explicit rule-making authority granted by the General Assembly.*"<sup>1</sup>

According the statutory language its plain and ordinary meaning, I conclude that the General Assembly intended that the Commission have exclusive authority to promulgate regulations for freezing the minimum renewable energy purchase requirements, including regulations regarding when and how the calculations will be made.<sup>2</sup>

Judge LeGrow's clearly stated that "[t]his is the only explicit rule-making authority granted by the General Assembly."<sup>3</sup> This clear declaration should limit what subjects can and should be included in any amendment to Reg. 3008.

3. *Creating a right of judicial review goes well beyond the scope of PSC Orders No. 9024 and No. 9025.*

The Commission reopened Reg. Docket No. 56 "for the limited purpose of complying with the Memorandum Opinion, issued December 30, 2016, in *Delaware Division of the Public Advocate v. Delaware Public Service Commission*." The Commission wisely opened the docket to consider a limited set of issues. The Commission should not expand the scope of this docket to include this matter since Judge LeGrow did not include it in her Memorandum Opinion.

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<sup>1</sup> *Del. Div. of the Pub. Advocate v. Del. Pub. Serv. Comm'n*, 2016 WL 7494899, at \*5 (Del. Super. Dec. 30, 2016)(emphasis added).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

4. *The provisions are based on an incorrect interpretation of 29 Del. C. § 10141(b).*

As a threshold matter, Section 10141(b) provides the right to judicial review of regulations, not agency actions or case decisions. The draft regulations incorrectly cite Section 10141(b) as the authority to make DNREC's decision to freeze the RPS a "Final Agency Action." Agency case decisions are addressed by the APA at Sections 10121-10129. Presumably, Staff's draft regulations at sections 3.2.21.6.2 and 3.2.21.9.2 create a right of judicial review of DNREC's decisions to freeze the RPS. These sections of the draft regulations are unlawful, however, because DNREC is not subject the provisions of the APA that govern case decisions and the subsequent right to judicial review.<sup>4</sup>

When it enacted the APA, the General Assembly established the rules for state agency conduct.<sup>5</sup> The APA's stated policy is to: "standardize the procedures and methods whereby certain state agencies exercise their statutory powers and to specify the manner and extent to which action by such agencies may be subjected to public comment and *judicial review*."<sup>6</sup> Unlike the federal APA, the right to judicial review under the Delaware APA is narrow.<sup>7</sup> The Delaware Supreme Court has recognized the Delaware APA's limited right to judicial review, holding that not all agency conduct is subject to judicial review because "not all agency conduct comes within the scope of 'regulations' or 'case decisions.'"<sup>8</sup> The Supreme Court held that there is "category of agency conduct that 'operate[s] outside the scope of the APA.'"<sup>9</sup> In addition, the Supreme Court stated that the General Assembly's decision not to provide for judicial review of all agency conduct demonstrates its legislative intent, stating that "the legislature knows how to provide for [judicial] review when it so desires."<sup>10</sup> Section 10161 exempts DNREC and other state agencies from many of the provisions of the APA, including the right to judicial review for DNREC case decisions.<sup>11</sup> Therefore, sections 3.2.21.6.2 and 3.2.21.9.2 of the draft regulations are unlawful.

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<sup>4</sup> *Free-Flow Int'l, Inc. v. Dep't of Natural Res. and Envtl. Control*, 861 A.2d 1233, 1236 n.14 (Del. 2004)(citing 29 Del. C. § 10161(b)).

<sup>5</sup> §§ 10101-10161.

<sup>6</sup> § 10101. (emphasis added).

<sup>7</sup> *O'Neill v. Town of Middletown*, 2006 WL 205071, at \*8 (Del. Ch. Jan. 18, 2006)(citing § 10101).

<sup>8</sup> *Id.* (quoting *Free-Flow Int'l, Inc.*, 861 A.2d 1233).

<sup>9</sup> *Id.* (quoting *Free-Flow Int'l, Inc.*, 861 A.2d at 1236).

<sup>10</sup> *Id.* at \*10.

<sup>11</sup> *Id.* at \*11 (citing §§ 10161(a), 10161(b)).

5. *The PSC does not have the authority to create a right to judicial review for another state agency.*

This docket concerns REPSA, which is found in Title 26. The right to judicial review of a DNREC decision is governed by Title 29, which is beyond the purview of the Commission. While the Commission may have a point of view on how DNREC's determinations may or may not be appealed, it does not have the authority under Title 29 to decide this matter for a state agency not subject to PSC regulation.

Under Delaware law, "[i]t is well established that administrative agencies ... derive their powers and authority *solely* from the statute creating such agencies and which define their powers and authority."<sup>12</sup> On appeal, a court will review an agency's enabling statute to determine the extent of its power and to decide whether the agency has exceeded its authority.<sup>13</sup>

The Public Service Commission is a public body created by statute.<sup>14</sup> As such, the Commission's authority is limited to those powers vested in the Commission by the General Assembly. Among its circumscribed statutory authority, the Commission has the ability to promulgate regulations, but that power is not absolute. The Commission's regulatory authority is limited to specific topics, and nowhere does its enabling statute vest the Commission with the authority to preempt the APA. More importantly, the statute at issue, REPSA, does not authorize the Commission to determine that DNREC's decision to freeze the RPS is a case decision that is subject to judicial review.<sup>15</sup> Such a regulation vastly exceeds the Commission's statutory and regulatory authority, and therefore, it is an unlawful exercise of the Commission's regulatory authority.

6. *The Staff Review and Recommendations does not offer a sufficient policy basis or legal reasoning for asserting a right to judicial review.*

The "intense disagreement"<sup>16</sup> cited by Staff is an insufficient basis for creating a right to judicial review where none exists. The presence of a disagreement, in and of itself, does not provide a sufficient basis for asserting a right to judicial review.

Staff's citation of the legislative debate is insufficient for two reasons: First, the statute itself is clear on the discretion conveyed to the Director. No legislative debate can control when the statute itself is clear or at least silent. Second, the legislative debate does not even hint at a right to judicial review of the Director's determination. No appeal to legislative intent can survive a complete lack of discussion of the question in the statute or the debate.

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<sup>12</sup> *Office of the Comm'n, Del. Alcoholic Beverage Control v. Appeals Comm'n, Del. Alcoholic Beverage Control*, 116 A.3d 1221, 1226 (Del. 2015) (quoting *Wilmington Vitamin & Cosmetic Corp. v. Tigue*, 183 A.2d 731, 740 (Del. Super. 1962) (emphasis in original)).

<sup>13</sup> *Am. Ins. Ass'n v. Del. Dept. of Ins.*, 2006 WL 3457623, at \*3 (Del. Super. Nov. 29, 2006) (citing *State v. Raley*, 1991 WL 18114, at \*1 (Del. Super. Feb. 8, 1991)).

<sup>14</sup> 26 Del. C. §§ 101-711.

<sup>15</sup> *See Del. Div. of the Pub. Advocate*, 2016 WL 7494899, at \*5.

<sup>16</sup> PSC Regulation Docket 56, *Staff Review and Recommendation*, at 32.

## **Conclusion**

DNREC previously supported Staff's first draft amendments to Reg. 3008, characterizing its "approach as conservative in hewing as closely as possible to the statutory language and the Commission's mandate in amending Reg. 3008." Unfortunately, Staff strayed from this conservative approach in proposing a judicial review in its second iteration. Indeed, Staff did not even broach this subject in its first draft.

Apart from this exception, DNREC believes that Staff has crafted an amended regulation that is consistent with the statute, meets the requirements of Judge LeGrow's Memorandum Opinion, and does what the Commission asked in its orders reopening Reg. 3008. Staff's error in proposing this right to judicial review is unfortunate, since DNREC previously voiced support for Staff's first proposal. DNREC would support the draft regulation if the two sections were removed. But DNREC cannot support the proposed regulation in its current form.

Respectfully submitted,

Thomas Noyes  
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## **Appendices**

1. Renewable Energy Portfolio Standards Act (Title 26, Chapter 1, Public Service Commission Subchapter III-A, Renewable Energy Portfolio Standards)
2. State of Delaware - 145th General Assembly, Senate Debate, Senate Substitute No. 1 for Senate Bill No. 119, June 22, 2010
3. State of Delaware - 145th General Assembly, House Debate, Senate Substitute No. 1 for Senate Bill No. 119, June 29, 2010
4. Memorandum Opinion, *Del. Div. of the Pub. Advocate v. Del. Pub. Serv. Comm'n*, 2016 WL 7494899 (Del. Super. Dec. 30, 2016).
5. PSC Regulation Docket 56, Order No. 9024.
6. PSC Docket 15-1462, Order No. 9025.